

IN THE

ALEXANDER L. STEVAS,
CLERK

Supreme Court of the United States

OCTOBER TERM 1983

EL PASO TIMES, INC.,
 THE ASSOCIATED PRESS AND PATRICK WIER,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE
 WESTERN DISTRICT OF TEXAS
Respondent.

**Petition for Writ of Certiorari to the
 United States Court of Appeals
 for the Fifth Circuit**

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QUESTIONS PRESENTED

- I. WHETHER THE ORDER OF THE DISTRICT COURT IS AN IMPERMISSIBLE PRIOR RESTRAINT WHICH DENIES TO THE PUBLIC AND THE PRESS ACCESS TO INFORMATION CONCERNING THE JUDICIAL PROCESS IN VIOLATION OF THE FIRST AMENDMENT
- II. WHETHER THE COURT'S ORDER UNCONSTITUTIONALLY IMPAIRS PETITIONERS FIRST AMENDMENT RIGHTS IN THE ABSENCE OF ANY THREAT TO THE ADMINISTRATION OF JUSTICE
- III. WHETHER THE DISTRICT COURT'S FAILURE TO HOLD A HEARING OR PRESENT FINDINGS OF FACT TO JUSTIFY THE ORDER RENDERS IT UNCONSTITUTIONAL
- IV. WHETHER THE DISTRICT COURT'S ORDER OFFENDS THE CONSTITUTION BECAUSE: (1) IT IS VAGUE AND OVERBROAD; (2) IT FAILS TO ACCOMPLISH ITS INTENDED PURPOSE (3) LESS RESTRICTIVE ALTERNATIVES WERE AVAILABLE

* Pursuant to Supreme Court Rules 21.1(b) and 28.1 the following were parties to the proceeding below:

The Honorable William S. Sessions, Chief Judge, United States District Court, Western District of Texas

El Paso Times, Inc., a Delaware corporation, a wholly owned subsidiary of Gannett Co., Inc., a Delaware corporation

The Associated Press, a New York corporation

Patrick Wier, reporter for El Paso Times, Inc.

United States of America, and its attorneys, W. Ray Jahn, John C. Emerson and Le Roy Morgan Jahn, prosecutors in the underlying criminal case

Charles V. Harrelson, Jo Ann Harrelson, and Elizabeth Chagra, defendants in the underlying criminal case

Warren Burnett, attorney for Elizabeth Chagra

Thomas G. Sharpe, Jr., attorney for Charles V. Harrelson

Charles Campion, attorney for Jo Ann Harrelson

The Express-News Corporation, publisher of a daily newspaper in San Antonio, Texas

Tom Nelson, reporter for The Express-News Corporation

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit has not yet been published in Federal Reporter 2nd Series. The opinion is set forth in its entirety in the appendix beginning at 1a.

JURISDICTIONAL STATEMENT

On December 14, 1982, a jury found Charles V. Harrelson, Joseph Chagra, Elizabeth Chagra and Jo Ann Harrelson guilty of various acts and conspiracies in connection with the murder of the Honorable John H. Wood, Jr., United States District Judge.

On January 26, 1983, the District Court entered the order restricting the questioning of discharged jury members which is the subject of this petition.

Petitioners appealed the constitutionality of the restrictive order to the United States Court of Appeals for the Fifth Circuit. The Circuit Court's opinion upholding the order below was announced on September 6, 1983. Appendix at 1a.

Jurisdiction over this matter and the First Amendment issues herein is conferred on this Court by 28 U.S.C. § 1257(3) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in part:

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

The Sixth Amendment to the United States Constitution provides, in part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .

United States District Court for the Western District of Texas, Rule 500-2 provides:

No attorney or any party to an action or any other person shall himself or through any investigator or other person acting for him interview, examine or question any juror, relative, friend or associate thereof either during the pendency of the trial or with respect to the deliberations or verdict of the jury in any action, except on leave of court granted upon good cause shown.

STATEMENT OF THE CASE

Petitioners who are members of the news media, seek review of the constitutionality of the January 26, 1983 order of the United States District Court for the Western District of Texas, restricting Petitioners' proposed interviews of discharged jurors in the underlying criminal case of *United States v. Charles Harrelson, et al.*, No. SA. 82-CR-57. Paragraphs (2) and (3) of the order are the subject of this petition.

2. No person may make repeated requests for interviews or questioning after a juror has expressed his or her desire not to be interviewed.
3. No interviewer may inquire into the specific vote of any juror other than the juror being interviewed.

Petitioners seek to have the order vacated as violative of the First Amendment.¹

On December 14, 1982, a jury found Charles V. Harrelson, Joseph Chagra, Elizabeth Chagra and Jo Ann Harrelson guilty of various acts and conspiracies with regard to the May, 1979, murder of the Honorable John H. Wood, Jr., United States District Judge. The trial was the subject of extensive national news coverage and had been reported in its entirety by Petitioners, *The El Paso Times*, its reporter Patrick Wier, and The Associated Press; Numerous other print and electronic media representatives, fully covered the proceedings.

As the District Court was discharging the jurors following their verdict, it admonished that its Local Court Rule 500-2 was applicable and that all persons were prohibited from contracting, questioning, and interviewing any juror, or his relatives, friends, or associates, concerning the jury's deliberations, except with leave of court granted upon good cause shown.

¹ In the unlikely event that the District Court should vacate the order pending review of this matter by this Court, the case will not be rendered moot thereby. "Jurisdiction is not necessarily defeated simply because the order attacked has expired if the underlying dispute between the parties is 'capable of repetition yet evading review.'" *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546 (1976).

Rule 500-2 has been applied to discharged jurors in both civil and criminal cases. The Rule provides:

No attorney or any party to an action or any other person shall himself or through any investigator or other person acting for him interview, examine or question any juror, relative, friend or associate thereof either during the pendency of the trial or with respect to the deliberations or verdict of the jury in any action, except on leave of court granted upon good cause shown.

Immediately after the return of the jury's verdict, Appellants filed their Motion of Non-Parties to Interview Jurors requesting that the District Court vacate its intended enforcement of Rule 500-2 as an unconstitutional restraint on their freedoms of speech and press. Appellants requested that they be permitted to interview the discharged jurors "without restriction of any sort whatsoever." On December 21, 1982, the District Court entered its Memorandum Opinion and Order denying the Motion of Non-Parties to Interview Jurors. Appellants filed their original Application for Writ of Mandamus (No. 82-1729) with the Fifth Circuit on December 23, 1982, requesting a writ directing the District Court to vacate its Order enforcing Rule 500-2. The application was denied by the panel on January 5, 1983.

On December 30, 1982, the Fifth Circuit decided *In re The Express-News Corporation*, 695 F.2d 807 (5th Cir. 1982), holding that Rule 500-2 and the District Court's order enforcing it, were unconstitutional as applied to the post-verdict interviews sought to be conducted with discharged jurors by the Express-News Corporation and its reporter, Cecil Clift in an unrelated criminal case.

Following the *Express-News* decision, the District Court declined to vacate its prior order enforcing Rule 500-2. Appellants then filed an Emergency Motion for Reconsideration of Denial of Application for Writ of Mandamus with the Fifth Circuit on January 11, 1983. The panel denied this motion on January 19, stating that the writ need not issue because the District Court had indicated that it would "carefully reconsider" its prior orders once the mandate was issued in the *Express-News* case.

On January 21 Appellants filed their Motion to Vacate Restrictions on Interviews of Discharged Jurors with the District court, again requesting the Court to immediately lift all limitations on the proposed interviews of the discharged jurors because the mandate in the *Express-News* case had issued and the decision had become final.

On January 26 the District Court signed the Order being appealed from, purporting to grant this last Motion to vacate. The Order, however, imposed four restrictions on the proposed interviews with the discharged jurors:

1. No juror has any obligation to speak to any person about this case, and may refuse all interviews or comment.
2. No person may make repeated requests for interviews or questioning after a juror has expressed his or her desire not to be interviewed.
3. No interviewer may inquire into the specific vote of any juror other than the juror being interviewed.
4. No interview may take place until each juror in this case has received a copy of this order, mailed simultaneously with the entry of this order.

Appellants readily admit that a discharged juror has no obligation to speak to any person about the case but contend that the other restrictions are unconstitutional restraints on the exercise of freedom of speech and of the press.

INTRODUCTION:

Reasons for Granting the Writ

This case for the first time raises the question of whether the Federal Courts may place restrictions upon rights of the public and the press to freely discuss with discharged jurors the nature of their deliberations in a criminal case.

Twice since 1980, this Court has ruled that the press and the public have a constitutional right of access to criminal trials. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Globe Newspapers Co. v. Superior Court*, — U.S. —, 102 S. Ct. 2613 (1982). On October 12, 1983, this Court heard argument in *Press Enterprise Company v. Superior Court of California*, No. 82-556 which raises the issue of whether there exists a First Amendment Right of Access to the Voir Dire portion of the trial.

The issues raised in this case are no less important. The District Court's order not only denies the public access to information concerning the jury's deliberations, it accomplishes this impermissible end by impermissible means. The order constitutes a prior restraint prohibiting all persons from asking discharged jurors certain questions concerning the deliberations. The Court's order denies the public and the press access to traditionally available and unprivileged information by virtue of a prior restraint on Freedom of Speech guaranteed under the First Amendment.

The District Court's order issued at a time when absolutely no sixth amendment interest in protecting the fairness of the trial existed. The jurors had been dismissed and the proceedings were at an end. Post trial statements by willing jurors contribute greatly to insuring the integrity of the judicial process and are thoroughly consistent with our tradition of open criminal trials. See *Richmond Newspapers v. Virginia*. 448 U.S. 555 (1980).

Finally, there exists a clear conflict between the Ninth and the Fifth Circuits with respect to the issue presented. Supreme Court Rule 17.1(a). In *United States v. Sherman*, 581 F.2d

1358 (9th Cir. 1978) the Ninth Circuit held that an order prohibiting the public and the press from talking to discharged jurors was an unconstitutional prior restraint. One panel of the Fifth Circuit agreed that a similar order based on Local Rule 500-2 was an unconstitutional denial of Access to information concerning a criminal trial. *In re The Express-News Corp.* 695 F.2d 807 (5th Cir. 1982). A second panel of the Fifth Circuit—the panel in the case before this Court—reached a contrary result, upholding the order entered below.

For the foregoing reasons, the petition for certiorari should be granted.

I. THE ORDER OF THE DISTRICT COURT IS AN IMPERMISSIBLE PRIOR RESTRAINT WHICH DENIES TO THE PUBLIC AND THE PRESS ACCESS TO INFORMATION CONCERNING THE JUDICIAL PROCESS IN VIOLATION OF THE FIRST AMENDMENT

In its opinion below, the Fifth Circuit rejected without comment the argument that the District Court's restrictive order constituted a prior restraint on freedom of speech choosing instead to characterize it as a restriction upon the gathering and dissemination of news.

Again, as in *Express News*, [695 F.2d 807 (5th Cir. 1982)] the field of battle is the area of tension between the First Amendment right to gather and publish information and the Sixth Amendment's guarantee of fair trial. We there noted the general principles governing decision of controversies such as this, supporting them with citation of authorities. 695 F.2d, at 809-10. We reiterate them summarily here: that the First Amendment right to gather news is neither absolute nor does it provide journalists with special privileges denied other citizens; that it must yield to an accused's right to a fair trial; but that restrictions upon it are permissible only to prevent a substantial threat to the administration of justice. *In this connection, jurors, even after completing their service, are entitled to privacy and to protection against harassment.* [Emphasis added] App. at 4a-5a.

The only justification for imposing restrictions on post-trial interviews of jurors found anywhere in the opinion below is the vague and unprecedented concept of juror privacy. The Fifth Circuit cites no authority whatever for the proposition that protection of the privacy of jurors rises to the level of a constitutional concern outweighing the acknowledged First Amendment interest in gaining access to newsworthy information.

The circuit court's opinion further fails to establish any link between the "substantial threat to the administration of justice" which it apparently felt existed, and the protection of the privacy of jurors after they have been discharged. Petitioners respectfully suggest that no connection exists between post-trial interviews of jurors and the defendants right to a fair trial.

The opinion of the appellate court is utterly void of the careful balancing of First and Sixth Amendment rights which this Court has painstakingly developed in prior cases. *Richmond Newspapers Inc., v. Virginia* 448 U.S. 555 (1980); *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979); *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539 (1976).

A. The District Court's Order Is A Prior Restraint Violative Of The First Amendment

As interpreted by the appellate court below, the District Court's order prohibits any person from asking a former juror to consent to an interview more than once or from asking a former juror how any other juror voted. App. at 7a-8a. The order is a clear prior restraint on freedom of speech. Such restraints are noxious to our First Amendment traditions.

The Ninth Circuit explicitly recognized that an order restricting post-trial interviews with discharged jurors was an unlawful prior restraint on First Amendment activity. In *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978), the court held:

The Supreme Court has recognized that news-gathering is an activity protected by the First Amendment, *Branzburg v. Hayes*, 408 U.S. 665, 681, 92 S. Ct. 2646, 33 L.Ed.2d 626 (1972), and the order here

clearly restrained the media in their attempts to gather news. As the order imposed this restraint prior to any attempt to contact the jurors, there is a heavy presumption against its constitutional validity. *Bantam Books v. Sullivan*, 372 U.S. 58, 70, 83 S. Ct. 631, 9 L.Ed.2d 584 (1963). The government in order to sustain the order must show that the activity restrained poses a clear and present danger or a serious and imminent threat to a protected competing interest, *Wood v. Georgia*, 370 U.S. 375, 82 S. Ct. 1364, 8 L.Ed.2d 569 (1962); the restraint must be narrowly drawn and no reasonable alternatives, having a lesser impact on First Amendment freedoms, must be available, *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 89 S. Ct. 347, 21 L.Ed.2d 325 (1968); *Shelton v. Tucker*, 364 U.S. 479, 81 S. Ct. 247, 5 L.Ed.2d 231 (1960). We believe the government has failed to meet this heavy burden.

Misguided attempts by the courts to protect the administration of justice through prior restraints have, without exception, been struck down by this Court. *Smith v. Daily Mail Publishing Co.* 443 U.S. 97, (1979); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). The use of the contempt power to silence press criticism of judicial proceedings has similarly been held unconstitutional. *Craig v. Harney*, 331 U.S. 373 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Bridges v. California*, 314 U.S. 252 (1941). The continuing prior restraint entered by the Court below with accompanying threat of contempt sanctions should similarly be held unconstitutional by this Court.

B. The Court's Order Constitutes An Unconstitutional Denial Of Access To Information Traditionally Available To The Public

Whether or not the order in this case is characterized as a prior restraint, there can be no doubt that its effect is to deny the public and the press, information which has never before been restricted in the history of our jurisprudence.

The only restrictions on post trial interviews of jurors known to petitioners have been directed to attorneys who have sought to conduct such interviews in search of grounds for setting aside verdicts. *United States v. Riley*, 544 F.2d 237, 242 (5th Cir. 1976), *cert denied*, 430 U.S. 932 (1977); *O'Rear v. Fruehauf Corp.*, 554 F.2d 1304, 1309-10 (5th Cir. 1977). In distinguishing orders applicable to attorneys from those aimed at the general public, the Fifth Circuit pointed out in *Express-News*, 695 F.2d at 810:

Such interviews would "denigrate jury trials by afterwards ransacking the jurors in search of some ground . . . for a new trial." 554 F.2d at 1310. But the interviews [by the press] in this case are sought for a different purpose.

Orders specifically directed to participants in litigation prohibiting interrogation of jurors are clearly distinguishable from the blanket denial of the public's right to converse with jurors following trial. The latter are without justification and clearly violate First Amendment rights.

In *In re Express-News*, 695 F.2d 807, 808-09 (1982), the Fifth Circuit recognized that:

The first amendment's broad shield for freedom of speech and of the press is not limited to the right to talk and to print. The value of these rights would be circumscribed were those who wish to disseminate information denied access to it, for freedom to speak is of little value if there is nothing to say. Therefore, the Supreme Court recognized in *Branzburg v. Hayes*, 408 U.S. 665, 681, 92 S. Ct. 2646, 2656, 33 L.Ed.2d 626, 639 (1972), that news-gathering is entitled to first amendment protection, for "without some protection for seeking out the news, freedom of the press could be eviscerated."

"The operation of the . . . judicial system itself . . . is a matter of public interest, necessarily engaging the attention of the news media," the Supreme Court said, overturning the criminal conviction of a news-

paper for publishing information about a confidential judicial misconduct investigation. *Landmark Communications v. Virginia*, 435 U.S. 829, 839, 98 S. Ct. 1535, 1542, 56 L.Ed.2d 1, 10 (1978). The publication of such information "clearly served those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect." *Id.* A year later, the Court held that a newspaper could not be punished for publishing lawfully obtained information identifying a juvenile defendant. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 99 S. Ct. 2667, 61 L.Ed.2d 399 (1979). In *Globe Newspaper v. Superior Court*, ____ U.S. ___, 102 S. Ct. 2613, 2624, 73 L.Ed.2d 248, 262 (1982), the Court noted that an inhibition of press news-gathering rights must be necessitated "by a compelling governmental interest, and . . . narrowly tailored to serve that interest."

From the foregoing, it is apparent that the Ninth Circuit has ruled that orders restricting juror interviews are prior restraints; one panel of the Fifth Circuit has ruled that a similar order is an unconstitutional denial of access to information. Now, a second Fifth Circuit panel has ruled that the restrictive order below is constitutionally permissible for reasons that remain unclear.

Because of the confusion engendered by these conflicting decisions and the continuing violation of First Amendment rights, petitioners respectfully urge this Court to grant the petition for certiorari.

II. THE COURT'S ORDER UNCONSTITUTIONALLY IMPAIRS PETITIONER'S FIRST AMENDMENT RIGHTS IN THE ABSENCE OF ANY THREAT TO THE ADMINISTRATION OF JUSTICE

It is a firmly established principle of constitutional law that governmental activity which limits the traditional exercise of First Amendment freedoms "cannot be justified upon a mere showing of a legitimate state interest." [Citation Omitted] The interest advanced must be paramount, one of vital importance,

and the burden is on the government to show the existence of such an interest." *Elrod v. Burns*, 427 U.S. 347, 362 (1976), *See also, Bantam Books v. Sullivan*, 372 U.S. 58, (1963). Thus the inhibition on news-gathering rights must be "necessitated by a compelling governmental interest, (that) is narrowly tailored to serve that interest." *Globe Newspapers Co. v. Superior Court*, U.S. ____, 102 S. Ct. 2613 (1982).

The restrictions on Petitioner are fundamentally unconstitutional since they do not serve to protect a sufficiently important competing interest. The only justification for imposing restrictions on post-trial interviews is the vague and unprecedeted concept of juror privacy. The Fifth Circuit below cites no authority whatever for the proposition that protection of the privacy of jurors rises to the level of a constitutional concern outweighing the acknowledged First Amendment interest in gaining access to newsworthy information. No Sixth Amendment interest of the accused's right to a fair trial is at issue here. *United States v. Sherman*, *supra*. *In re Express News Corp.*, *supra*. The order was entered after the jury had returned its verdict and had been discharged. Post-verdict interviews cannot thwart fair procedure or infect the verdict. "Since the trial had concluded, there was no possibility that allowing the jurors to speak to newsmen would deprive (defendant) of a fair trial. Those cases dealing with the so-called "free press-fair trial" issue are not applicable here." *United States v. Sherman*, *supra*, at 1361.

Moreover, mere judicial concern regarding the ability to obtain willing jurors in future trials or regarding the stifling of freedom of debate should juror's ballots be revealed involuntarily after trial, does not justify restriction, on First Amendment rights to gather news. No matter how earnestly held by the District or Appellate Courts, a speculative finding or belief that harm or danger to another interest might occur is not sufficient to justify restriction upon the free exercise of First Amendment freedoms. As the Ninth Circuit noted in *United States v. Sherman*:

The justifications offered for the order are to enable the jurors to serve on future jury panels and to

protect the jurors from harassment. Less restrictive alternatives are clearly available for each of these claimed threats. If a juror's impartiality were to be questioned because the juror has spoken to the media that could be discovered on future voir dire and the juror excused. The district court could, in the alternative, excuse all of these jurors from further service. We stress that the inability to serve on future juries is not such a serious nor an imminent threat to justify this restraint and that alternatives are easily available.

Id., at 1361.

Under Rule 500-2 and the Order at issue here, "petit jurors are free to discuss their service if they choose to do so, and the rule indeed implicitly sanctions juror's conversations with their relatives, friends and associates." *Express-News, supra*, at 810. The Order and decision of the Appellate Court below created an anomaly: individual jurors are free to disclose another jurors vote, even to volunteer such information to the media. Nonetheless, petitioners are prohibited from asking questions to discover this unprivileged and newsworthy information. The Appellate Court's finding "that reporters are persistent and tenacious in pursuing information," and that the trial of defendant was well publicized, App. at 6a, is no indication that another overriding interest, whatever its nature, was or will be directly, immediately or irreparably imperiled. As noted by the Ninth Circuit in *United States v. Sherman, supra*,

In regard to protecting the jurors from harassment, we also fail to see a clear and present danger. The jurors individually, perhaps, may not regard media interviews as harassing.

Id., at 1361

The Appellate Court below offered only unrecognized notions of juror privacy, speculative fear of future harassment and confidentiality of juror ballots as protected interests. There is absolutely no indication from the record that the press or other media had created a climate of public opinion which caused: inherent prejudice to defendant's right to a fair trial," *Irvin v. Dowd*, 366 U.S. 717 (1961); "created a circus atmos-

phere prejudicial to the fair administration of justice," *Sheppard v. Maxwell*, 384 U.S. 333 (1966); or conducted themselves in any manner inconsistent with their right to "report fully and accurately the proceedings of government . . . and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975). The court below has ignored the acknowledged constitutional interest in unfettered public access to jurors after trial. In protecting vague and unsubstantiated interests, the Appellate Court has failed adequately to consider "those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect." *Landmark Communications v. Virginia*, 435 U.S. 829, 839, (1978). As this Court noted recently in *Richmond Newspapers*:

Yet, [i]t is not unrealistic even in this day to believe that public inclusion [to Court proceedings] affords citizens a form of legal education and hopefully promotes confidence in the fair administration of justice, [Citations omitted.] Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media.

Id. at 572-73. The same considerations apply with equal force to post-trial interviews of jurors. It is no longer possible for the public to acquire its information concerning criminal trials through discussions with the jurors themselves or through word of mouth. The media must function as surrogates for the public in this regard.

III. THE DISTRICT COURT'S FAILURE TO HOLD A HEARING OR PRESENT FINDINGS OF FACT TO JUSTIFY THE ORDER RENDERS IT UNCONSTITUTIONAL

There is no question that a federal judge may exercise discretion in governing a jury trial for the purpose of guaranteeing that it is properly conducted. *Herron v. Southern Pacific*

Co., 283 U.S. 91 (1931). Like any other power, however, this authority does not exist entirely insulated from potential abuse. Even if a full blown hearing and fact finding process were not constitutionally required, an order issued *sua sponte* proscribing the conduct of a trial must be the outgrowth of more than a mere reflex. There must be at least some showing that the order is warranted. A prime example is the Fifth Circuit case, *In Re Express-News*, 695 F.2d at 807, wherein the Local Court Rule 500-2 of the United States District Court for the Western District of Texas was found unconstitutional as applied because, as in the present case, the right to gather news was restricted without any showing that the restriction was necessary.

Historically, newsgathering has been viewed by this Court as a protected activity under the First Amendment, *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972), and orders restricting such activity were shrouded with a heavy presumption against their constitutionality. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-89 (1975); *Organization for A Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *U.S. v. Washington Post Co.*, 403 U.S. 713 (1971); *Freedman v. Maryland*, 380 U.S. 51, 57 (1965), *Bantam Books v. Sullivan*, 372 U.S. 58 (1963).

And even where this presumption might otherwise be overcome, the Court has insisted upon careful procedural provisions, designed to assure the fullest presentation and consideration of the matter which the circumstances permit. As the Court said in *Freedman v. Maryland*, *supra* at 58, 13 L.Ed.2d at 654, a noncriminal process of prior restraints upon expression "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system."

Carroll v. Commissioners of Princess Anne, 393 U.S. 175, 181 (1968). The government is therefore required to justify the order in this case by showing that the restrained activity poses a clear and present danger or a serious and imminent threat to a competing protected interest. *Id.*; *U.S. v. Sherman*, 581 F.2d

1358 (9th Cir. 1978) *citing Wood v. Georgia*, 370 U.S. 375 (1962).²

The order below was summarily issued *sua sponte* in the absence of any record. There was absolutely no inquiry into the need for the restrictions imposed by the order nor any demonstration of its necessity. Moreover, no protected competing interest nor any other compelling governmental interest has been identified by either the respondents or the Court below. None of the parties or the jurors requested the order. They did not object when Petitioners attempted to have it lifted. It has yet to be explained how the fair administration of justice would have been sacrificed without the order.

Only months before the affirmance of the order, the Fifth Circuit itself upheld the requirement that any limitation of First Amendment freedoms be supported by the record and evidence before the District Court, *U.S. v. John McKenzie v. CBS*, (83-3026) ____ F.2d ____ (5th Cir. 1983). The Fifth Circuit stayed a District Court order which prohibited the broadcast of a "60 Minutes" television program because CBS had established a likelihood of success on the merits of its appeal by showing that the District Court had held no evidentiary hearing and that it's order was not supported by any findings whatsoever. More recently the Fifth Circuit found that the District Court's apprehension that broadcasting the program would improperly and prejudicially impact on the jury panel was "too speculative", and therefore issued another stay of a subsequent order. *Id.* Likewise, the fear of juror harassment expressed by the Court below in the present case is too speculative. In light of the barren record below, not only is the order in this case an inappropriate means of avoiding a hypothesized situation, but it also stands in contravention of First Amendment procedural principals.

The requirement embraced by the Fifth Circuit, that court orders limiting First Amendment rights be supported by at least

² It is firmly established that procedural safeguards, such as notice and a hearing, are required in access cases. *See, e.g. Globe Newspaper v. Superior Court*, ____ U.S. ____ (1982); *U.S. v. Brooklier*, 685 F.2d 1162 (9th Cir. 1982); *U.S. v. Cridden*, 675 F.2d 550 (3rd Cir. 1982); and *Miami Herald Publishing Co. v. Lewis*, ____ S. 2d ____ 1982 Florida Law Weekly 385 (Fla. Sup. Ct. No. 59, 392, Sept. 2, 1982).

an adequate record and findings, is not a novel one. The concept is firmly rooted in the judicial history of the First Amendment and the requirement itself is constantly being refined and reaffirmed throughout the Circuit Courts of Appeals. The requirement was originally established by the Seventh Circuit Court of Appeals in *Chase v. Robson*, 435 F.2d 1059 (7th Cir. 1970). In holding unconstitutional the District Court's order forbidding defendants and their attorneys from making any public statements concerning the pending criminal litigation, the Seventh Circuit declared:

... [T]hat before a trial court can limit defendants' and their attorneys' exercise of first amendment rights of freedom of speech, the record must contain sufficient specific findings by the trial court establishing that defendants' and their attorneys' conduct is "a serious and imminent threat to the administration of justice." *Craig v. Harney*, 331 U.S. 367, 373, 67 S.Ct. 1249, 1253, 91 L.Ed. 1546 (1947)... While we agree "[i]t is fundamental to our system of constitutional democracy that issues of law and fact in a criminal proceeding be resolved in the courts, and not in the news media nor in the streets" [quoting from the order in question], we believe equally fundamental to our system is the right of all citizens, even if they be criminal defendants to exercise their first amendment rights. In the absence of a clear showing that an exercise of those first amendment rights will interfere with the rights of the government and the defendants for a fair trial, we reject this prior restraint on first amendment freedoms.

Chase v. Robson, 435 F.2d at 1061. The findings by the District Court in justification of the subject order were ultimately found to be insufficient in that case. No findings by the District Court nor any evidence has been advanced at all in support of the order in this case.

One year later the Seventh Circuit reiterated its position in *Chase v. Robson*, 435 F.2d at 1059. The Court held that a blanket prohibition against all extra judicial comment by

counsel without regard to whether or not such remarks are potentially or in fact prejudicial to the administration of justice was in violation of the First Amendment and therefore null and void. *In Re Oliver*, 452 F.2d 111, 114-115 (7th Cir. 1971). The Court explained that such a prohibition "cannot stand without making a mockery of the free speech guaranty of the first amendment." *Id.*

The Third Circuit concurred in the requirement of a sufficient supporting record in *Rodgers v. United States Steel Corporation*, 536 F.2d 1001 (3rd Cir. 1976). The court issued a writ of mandamus vacating a protective order which prevented plaintiffs from disseminating an exhibit to the deposition of a Department of Justice attorney. *Id.* at 1009. The District Court had made no finding that the disclosure of the information would present an imminent threat to the administration of justice and, after reviewing the record, the Circuit Court of Appeals was satisfied that no such threat existed. *Id.* at 1008. In the instant case the Court of Appeals was not even afforded the benefit of a record to review.

The importance of requiring a supporting record to save an order which limits the media's post-trial access to jurors from constitutional challenge is epitomized in the following footnote from the opinion in *In Re Halkin*, 598 F.2d 176 (D.C. Cir. 1979):

The protection afforded expression by the First Amendment would be illusory if every conceivable threat to an important public interest, no matter how remote or speculative, were sufficient to justify a restriction of speech. Yet, as the Supreme Court noted in *Nebraska Press Ass'n.*, 427 U.S. at 563, 96 S. Ct. 2791, a determination of the likelihood of future harm from as yet unuttered speech will necessarily be speculative. Courts have struggled mightily to capture in words the requisite probability of harm mandated by the First Amendment, seeking to maximize the range of possible expression consistent with the valid claims of important conflicting interests.

Id. at 193 n.42. The Court of Appeals held that the order which prohibited extra-judicial disclosure of information obtained through discovery, but which was silent as to its reasons, rested on no express findings and was unsupported by any evidence, was deficient and that mandamus was the appropriate remedy. *Id.* at 198. As in the instant case no requisite probability of harm nor important conflicting interest was demonstrated. As the D.C. Circuit stated, “[a]n order restraining speech cannot be based on a record that reveals only naked speculation that the right to a fair trial might be jeopardized. *Nebraska Press Ass'n*, 427 U.S. at 564, 96 S. Ct. 2791.” *Id.* at 193. The similarities between the present case and *In Re Halkin* are easy to discern. The District Courts in both cases imposed restrictions on the proposed interviews of discharged jurors with no findings or evidence whatsoever that such restrictions were necessary to prevent harm to a substantial and important competing interest or the fair administration of justice.

In the present case the Court below has attempted to dispose of the Petitioners' contentions by declaring that,

There are truisms known to all, and if they form a sufficient basis for the court's order, it is not invalid merely because [the judge] held no unnecessary hearing and wrote no redundant findings of fact concerning them before handing it down. Specific matters outside common knowledge, however, doubtless could not be urged in support of the order without such a proceeding.

App. at 6a. The notion that it is a truism known to all that reporters are persistent and tenacious in gathering the news to the point of harassment is hard to accept. The assumption that harassment of jurors by the media automatically arises from widely followed and publicized trials is pure conjecture. Nevertheless, the Fifth Circuit characterizes this supposition as common knowledge. The Circuit Court below appears to have taken judicial notice of the propensities of all reporters. Such sweeping generalizations about an entire profession are not supportable.

Furthermore, the precedent cited in support of the Court's conclusion is inapposite to the issue of whether a federal judge needs to hold hearings or present findings of fact to justify an order which limits the media's access to jurors subsequent to the conclusion of the trial. In *Sheppard v. Maxwell*, 384 U.S. 33 (1966) for example, this Court addressed the issue of the Court's power to control the courtroom and the courthouse before and during a trial, not afterward.

In *Estes v. Texas*, 381 U.S. 532 (1965), this Court was also faced with a question regarding a federal judge's discretion during the course of a trial. A criminal conviction was set aside because the judge had permitted the proceedings to be televised and broadcast. The conviction was set aside without a showing of specific prejudice because the Sixth Amendment right to be fairly dealt with and not unjustly condemned was at stake. The focus of the order in this case, however, is only the post-trial activities of the media. There are no competing Sixth Amendment interests to preserve.

Finally, the Judge's refusal to direct that the names and addresses of jurors be released to the public was upheld in *U.S. v. Gurney*, 558 F.2d 1202 (5th Cir. 1977). The Court's ruling in that case also dealt with the period before and during the trial and was reasonably related to the purpose of safeguarding the Sixth Amendment right to a fair trial. Even more significant in that case is the fact that the reasons for the order had been formulated in a prior hearing on the same subject. *Id.* at 1211. As stated in *U.S. v. Sherman*, 581 F.2d at 1361, the "cases dealing with the so-called 'free press-fair trial' issue are not applicable here" because the trial had been concluded.

In conclusion, limitations cannot be imposed on First Amendment rights without an evidentiary hearing or findings of fact which show that they are necessary to prevent harm to a substantial and important competing interest such as the fair administration of justice. The District Court's order should be vacated because it is not supported by any such record.

IV. THE DISTRICT COURT'S ORDER MUST BE VACATED BECAUSE THE RESTRICTIONS IMPOSED ARE UNCONSTITUTIONALLY VAGUE AND OVERBROAD; THE ORDER FAILS TO ACCOMPLISH ITS INTENDED PURPOSE; LESS RESTRICTIVE ALTERNATIVES WERE AVAILABLE

A. The District Court's Order Must Be Vacated Because The Restrictions Imposed Are Unconstitutionally Vague And Overbroad

Among the constitutional defects which render the order invalid is the fact that it is both vague and overbroad. The order mandates that "no person may make repeated requests for interviews or questioning after a juror has expressed his or her desire not to be interviewed" and that "no interviewer may inquire into the specific vote of any juror other than the juror being interviewed." These proscriptions are so vague that they offend the due process clause because they deny persons of ordinary intelligence a reasonable opportunity to know what is prohibited so that they may adjust their behavior accordingly. An order which limits expression and is so vague is violative of the First Amendment because it abrogates freedom of speech. Its uncertain meaning requires those who may be subject to the order to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly delineated. *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979); *see also International Society for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809 (5th Cir. 1979). Furthermore, if read literally the order is unconstitutionally overbroad because it unnecessarily restricts the constitutionally protected activity of newsgathering. *Branzburg v. Hayes*, 408 U.S. at 665.

The explanation of the language of the order in the opinion below does not alleviate the vagueness and overbreadth. The opinion below by the Fifth Circuit determined that "'no person' can have but one meaning: no one—not the judge, not another juror, not Mrs. Grundy, and not the President of the United States." App. at 7a. The court offered no insight, however, as to why "no person" may repeatedly request an interview, while on the other hand "no interviewer" may make

an inquiry regarding the specific vote of another juror. Absent any explanation of the distinction between "no person" and "no interviewer" in sections two and three of the order, respectively, or the rationale behind the distinction, the court's definition of "no person" does not help to dispose of the vagueness issue and represents a gaumless exercise of judicial analysis.

Borrowing the words of the court below, the discussion of the meaning of "repeated requests" is somewhat closer to the mark but is not persuasive. Although it is conceded that mathematical certainty is not necessary, the fact that a "repeated request" may be any request after the first request does not provide a person with sufficient guidance for conducting their activities within the letter of the law. Does this restriction prohibit Petitioners from making an initial request for an interview with a discharged juror if Petitioners have knowledge that another individual, regardless of his identity, profession, purpose or lack of connection with Petitioners, has requested a similar interview and been denied? If the particular juror is initially approached at an inopportune or inconvenient moment, must the would-be interviewer assume that the juror desires not to be interviewed at all? Once the one and only interview the juror is willing to give is concluded, is the interviewer permitted to contact the juror to fill in gaps in the story and in his notes which have only become apparent during the drafting stages subsequent to the interview?

The restriction against inquiring into the specific vote of any juror other than the juror being interviewed is similarly unconstitutionally vague. There is no indication as to whether the limitation applies to every vote on every matter discussed by the jury. Does the restriction only apply to the ultimate vote concerning the guilt or innocence of the defendant, or does it also apply to the election of the foreman or the decision as to the credibility of the specific evidence? The vagueness of the restriction deprives the Petitioners of their constitutional right to fair notice of its meaning. *See Shelton v. Tucker*, 364 U.S. 479, 488, (1960). Contrary to the reference in the opinion below, the case *U.S. v. Gurney*, 558 F.2d 1202 (5th Cir. 1977), does

not alone justify the restrictions promulgated in the order. The Court in *U.S. v. Gurney, supra* at 1202, held that the judge's refusal to direct that names and addresses of jurors be publicly released was not an abuse of discretion. The issue was only addressed, however, in the context of the period before and during the trial, not after the trial was concluded.

Thus, the vagueness in the limitations propounded by the order is fatal to the constitutionality of the order because:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. . . [W]here a vague statute "abut[s] upon sensitive areas of basic First Amendment Freedoms," [Footnote to *Baggett v. Bullitt*, 377 U.S. 360, 373, 12 L.Ed 2d 377, 385, 84 S.Ct 248 (1961) (Harlan, J., concurring in judgment)], it operates to inhibit the exercise of those freedoms." [Footnote to *Cramp v. Board of Public Instruction*, 368 U.S. at 287, 7 L.Ed 2d at 292]. Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." [footnote omitted].

Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); See also, *International Society for Krishna Consciousness of Atlanta v. Eaves, supra* at 830-31; *Hirschkop v. Snead, supra* at 370-71.

Where the vagueness in the order leaves off the overbreadth takes over in rendering the order unconstitutional. The Court below stated that,

We see no room for doubt that at *some* point repeated importunings of one who has declined to be interviewed became harassment and an improper invasion of his privacy. (Original emphasis).

App. at 7a. The essence of this assumption cannot be denied. The problem is that neither the order nor the opinion below provide even the slightest hint as to when "some point" occurs in the newsgathering process. Although the Court in *In Re Express-News, supra* at 810-811, expressly reserved comment

on the validity of an order which is narrowly tailored to prevent the disclosure of the individual jurors' ballots or some other overriding interest, it did emphasize that, "unrestrained post-verdict inquiry into every juror's vote and every jury's deliberations in every trial might be harmful cannot validate a categorical denial of all access." *Id.* See also, *In Re Halkin, supra* at 191 n.35, *Rodgers v. U.S. Steel, supra* at 1007-1008; *U.S. v. CBS, Inc.,* 497 F.2d 102 (5th Cir. 1974); *Chase v. Robson, supra* at 1061.

In summation, the restrictions against repeated requests for interviews and against inquiries into the specific votes of other jurors are too vague to afford any member of the public fair notice of proscribed conduct, and, if literally interpreted, sweeps far too broadly to preclude unwarranted infringement of constitutionally protected newsgathering.

In this sensitive field, the State may not employ "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker, 364 U.S. 479, 488, 5 L.Ed. 2d 231, 237, 81 S. Ct. 247 (1960).* In other words, the order must be tailored as precisely as possible to the exact needs of the case.

Carroll v. Commissioners of Princess Anne, supra at 183-84. The order issued by the District Court clearly contravenes the constitutionally mandated admonitions against vague and overbroad orders which restrict the exercise of First Amendment freedoms, and therefore it should be vacated.

B. The Order Fails to Accomplish its Intended Purpose

In assessing whether a particular state interest is sufficient to justify the curtailment of free speech, this Court has taken the firm position that, where a prior restraint on publication is involved, the probable efficacy of such a measure must be carefully assessed. In *Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976)*, this Court struck down a gag order prohibiting publication on the ground, inter alia, that the practical problems involved placed the efficacy of the order in grave doubt. Chief Justice Burger, writing for the Court, stated:

Finally, we note that the events disclosed by the record took place in a community of 850 people. It is

reasonable to assume that, without any news accounts being printed or broadcast, rumors would travel swiftly by word of mouth. One can only speculate on the accuracy of such reports, given the generative propensities of rumors; they could well be more damaging than reasonably accurate news accounts. But plainly a whole community cannot be restrained from discussing a subject intimately affecting life within it.

Id. at 567.

The ineffectiveness of the order in the instant case can be easily demonstrated. Because the order is addressed to the public and not to the discharged jurors, the latter are free to disclose, with impunity, any information concerning the deliberation including the votes of other jurors. The patent ineffectiveness of the restrictive order is yet another well established and incontrovertible basis supporting its constitutional infirmity.

C. Restrictive Alternatives Are Available

The Order unduly interferes with the Petitioners' news gathering efforts and there are alternatives available to the District Court which would have a lesser impact on First Amendment freedoms. *Nebraska Press Association v. Stuart, supra*, 562-65, requires that the least onerous alternative be used before the press may be restrained and told how it may gather and disseminate news.

The order punishes persistence—a virtue in all callings and professions. A dutiful, professional reporter betrays his obligation if he accepts "no comment" for an answer; the Order threatens sanctions by the District Court if a reporter persists. The Order purports to forbid conduct which is usual and ordinary—it seeks to insulate jurors from contact prior to any request for protection and prior to any showing that they would be subject to harassment. If harassment rises to the level of tortious conduct, then an appropriate injunction prohibiting such conduct should issue.

The Order deprives Petitioners of a well established and important news gathering technique. It is not unusual for a journalist to encounter a reluctant person who will initially decline to be interviewed, but upon reflection may change his mind after the passage of time. The Court should not deprive

Petitioners of this invaluable newsgathering tool in the complete absence of any showing that the restriction is necessary or justified.

This Court should require the District Court to follow the obviously less restrictive alternative. Rather than preclude industrious reporting by the threat of its contempt powers, the Courts are well equipped to prevent harassment if it occurs.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted

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APPENDIX

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT.

Nos. 83-1095, 83-1107.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES V. HARRELSON, *et al.*,

Defendants,

v.

EL PASO TIMES, INC., *et al.*,

Movants-Appellants.

In re EL PASO TIMES, INC., the
Associated Press and Patrick Wier,

Petitioners.

Sept. 6, 1983.

Appeal from the United States District Court for the
Western District of Texas.

On Application for Writ of Mandamus to the United States
District Court for the Western District of Texas.

Before THORNBERRY, GEE, and WILLIAMS, Circuit
Judges.

GEE, Circuit Judge:

At issue on this appeal is the constitutional validity of two
restrictions on post-verdict interviews with jurors by the press:
that forbidding repeated importunings for interviews and that
forbidding inquiry into specific votes by other jurors. We
uphold both.

Facts and Procedural History

On December 14, 1982, a jury found Charles V. Harrelson, Joseph Chagra, Elizabeth Chagra and Jo Ann Harrelson guilty of various acts and conspiracies with regard to the May 1979 murder of the Honorable John H. Wood, Jr., United States District Judge. As the district court was discharging the jurors following their verdict, it admonished that its Local Court Rule 500-2 was applicable and that all persons were prohibited from approaching, questioning, or interviewing any juror, or his relatives, friends, or associates, concerning the jury's deliberations, except with leave of court granted upon good cause shown. Rule 500-2 provides:

No . . . attorney or any party to an action or any other . . . person shall himself or through any investigator or other person acting for him interview, examine or question any juror, relative, friend or associate thereof either during the pendency of the trial or with respect to the deliberations or verdict of the jury in any action, except on leave of court granted upon good cause shown.

After the jury's verdict, appellants filed a Motion of Non-Parties to Interview Jurors requesting that the district court vacate its intended enforcement of Rule 500-2 as an unconstitutional restraint on their freedoms of speech and press. Appellants requested that they be permitted to interview the discharged jurors "without restriction of any sort whatsoever." On December 21, 1982, the district court entered its Memorandum Opinion and Order denying the Motion of Non-Parties to Interview Jurors. The district court refused to accept appellants' characterization of Rule 500-2 as a "prior restraint" carrying a heavy presumption against its constitutional validity, viewing it instead as only a "restraint on access, but not as a prior restraint on speech, expression or publication." Although the district court recognized that Rule 500-2 had an "incidental effect on news gathering," it held that the Rule served the interest of justice since it preserved the confidentiality of jury deliberations. In response to the district court's order, appellants filed an Application for Writ of Mandamus (No. 82-

1729) with this court seeking a writ directing the district court to vacate its Order enforcing Rule 500-2. The application was denied.

On December 30, 1982, this court decided *In re The Express-News Corporation*, 695 F.2d 807 (5th Cir. 1982), holding that Rule 500-2, and the district court's order enforcing it, were unconstitutional as applied to post-verdict interviews sought to be conducted with discharged jurors by the Express-News Corporation in an unrelated criminal case.

In response to the *Express-News* decision, appellants filed a Motion to Vacate Memorandum Opinion and Order in the district court, noting that *Express-News* had held Rule 500-2 and the district court's Order enforcing it unconstitutional and asking the district court to vacate its prior order enforcing the Rule in the instant case. On January 5, 1983, the district court denied the Motion to Vacate, declining to follow *Express-News* because that decision was not yet final and the mandate had not issued. In its Order, the district court ruled that *Express-News* had not held the Rule unconstitutional on its face, thus leaving the court with "considerable latitude in applying Rule 500-2;" the district court indicated that when *Express-News* became final and the mandate issued it would take the "appropriate action."

In light of the *Express-News* decision and the district court's continued refusal to vacate its prior order enforcing Rule 500-2, on January 11, 1983, appellants filed with this court an Emergency Motion for Reconsideration of Denial of Application for Writ of Mandamus. A panel denied this motion on January 19, stating that the writ need not issue because the district court had indicated that it would "carefully reconsider" its prior orders once the mandate was issued in the *Express-News* case.

On January 21 appellants filed with the district court their Motion to Vacate Restrictions on Interviews of Discharged Jurors, again requesting the district court to lift immediately all limitations on the proposed interviews of the discharged jurors because the mandate in the *Express-News* case had issued and the decision had become final.

On January 26 the district court signed the Order presently before us on appeal, partially granting this last Motion to Vacate. The Order, however, imposed four restrictions on proposed interviews with the discharged jurors:

1. No juror has any obligation to speak to any person about this case, and may refuse all interviews or comment.
2. No person may make repeated requests for interviews or questioning after a juror has expressed his or her desire not to be interviewed.
3. No interviewer may inquire into the specific vote of any juror other than the juror being interviewed.
4. No interview may take place until each juror in this case has received a copy of this order, mailed simultaneously with the entry of this order.

Appellants readily admit that a discharged juror has no obligation to speak to any person about the case but contend that the other restrictions are unconstitutional restraints on the exercise of their freedoms of speech and press. The focus of this appeal and the companion mandamus action is upon restrictions two and three of the Order. Appellants do not attack numbers one and four.

At appellants' request, we have consolidated this appeal with appellant's Application for Writ of Mandamus (No. 83-1107) which complains of the same provisions of the district court's Order.

Analysis and Discussion

Again, as in *Express-News*, the field of battle is the area of tension between the First Amendment right to gather and publish information and the Sixth Amendment's guarantee of fair trial. We there noted the general principles governing decision of controversies such as this, supporting them with citation of authorities. 695 F.2d, at 809-10. We reiterate them summarily here: that the First Amendment right to gather news

is neither absolute nor does it provide journalists with special privileges denied other citizens; that it must yield to an accused's right to a fair trial; but that restrictions upon it are permissible only to prevent a substantial threat to the administration of justice. In this connection, jurors, even after completing their service, are entitled to privacy and to protection against harassment.

Before addressing the merits of the restrictions imposed we dispose of two contentions extraneous to them. The press appellants assert—or at least insinuate—on brief that the press is singled out by the court's order, which supposedly subjects the press to restraints not applicable to others. This is not so. The two restrictions complained of to us commence, respectively: "No person" and "No interviewer." Broader general language is unimaginable; this applies to the press, to the lady next door, to other jurors, and to the rest of the world. Complaint is also made that although jurors are not forbidden to disclose the votes of other jurors voluntarily, no interviewer may ask them to do so. We see no legal force in this complaint, which seems to find fault with the order as insufficiently broad a restraint on freedom of speech. The press appellants have no standing to complain that another's freedom to speak has *not* been restrained. If the complaint is intended as some species of equal protection argument, it fails since the two groups—the press and former jurors—are not similarly situated. Had the newspapers been restrained while radio news reporters were not, such a complaint would have force.

The second threshold contention is that the court's order was imposed without an evidentiary hearing and without findings of fact regarding any substantial threat to the administration of justice in this particular instance. Though this is a shot somewhat closer to the mark, we are not persuaded. A federal judge is not the mere moderator of a jury trial; he is its governor for the purpose of insuring its proper conduct. *Herron v. Southern Pacific Co.*, 283 U.S. 91, 51 S.Ct. 383, 75 L.Ed. 857 (1935). As such, he exercises a broad discretion, based on the law and on his own and common experience, over many of its aspects: the admission and exclusion of evidence, the extent of

examination and cross-examination, and the handling of the jurors. It is for him to decide, for example, whether or not they are to be sequestered, what restrictions are to be placed on their access to outside information, and the like. He need neither hold hearings to justify nor make fact-findings to support his orders in such matters. And while it is possible for him to act with undue restrictiveness in such matters, it is also possible for him to be too lax and to suffer reversal for that reason. *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). This is especially true of widely publicized or sensational cases; convictions in such cases have been set aside on such grounds even without a showing of specific prejudice. *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965). Nor does his power to prevent harassment of jurors end with the case. *In Re Express-News Corp., supra*; *United States v. Gurney*, 558 F.2d 1202 (5th Cir. 1977).

The trial of Judge Wood's assassins was as widely followed and publicized a one as could well be imagined. No hearing was required to ascertain this, nor was one requisite to a determination that reporters are persistent and tenacious in pursuing information and that they seek it regarding the nonpublic portions of legal proceedings (jury deliberations, bench conferences between court and counsel, excluded evidence, etc.) as well as the public ones. *See, e.g., Gurney, supra*. There are truisms known to all, and if they form a sufficient basis for the court's order, it is not invalid merely because he held no unnecessary hearing and wrote no redundant findings of fact concerning them before handing it down. Specific matters outside common knowledge, however, doubtless could not be urged in support of the order without such a proceeding. None are here. Having disposed of these contentions, we turn to the specific portions of the order complained of.

The Ban on Repeated Requests for Interviews

"No person may make repeated requests for interviews or questioning after a juror has expressed his or her desire not to be interviewed."

We first consider the press appellants' attack on this portion of the order as too vague to give fair notice of what conduct is prohibited. It must be conceded that portions of the passage, like most nonmathematical statements, are subject to construction. Any fair-minded construction of these, however, can lead to but one result. We observed earlier that "No person" can have but one meaning: no one—not the judge, not another juror, not Mrs. Grundy, and not the President of the United States. "Repeated requests" means more than one; any request beyond one is a repeated one. Mathematical certainty is not necessary; what is forbidden is wheedling and importuning. And even this is only partly forbidden; the juror is fair game until he expresses his desire not to be interviewed in such a manner that the would-be interviewer knows of that desire. The press appellants' suggestion that a finding of contempt might follow upon a showing that a juror was approached after making a private expression of disinclination—as by telling her husband, whispering into a closet, or advising a neighbor—is absurd.

Little more need be said in order to dispose of the attack on this portion of the order. It is settled in our circuit that "jurors, even after completing their duty, are entitled to privacy and to protection against harassment." *In re Express-News Corp.*, 695 F.2d at 810. We see no room for doubt that at *some* point repeated importunings of one who has declined to be interviewed became harassment and an improper invasion of his privacy. Thus the question becomes one of degree: how many turndowns are too many? One? three? fifteen?

The trial court concluded that one request made after a known refusal to be interviewed was enough to allow and that more—repeated requests—were too many. We cannot say that in so concluding he abused his discretion. Common sense tells us that a juror who has once indicated a desire to be let alone and to put the matter of his jury service behind him by declining to be interviewed regarding it is unlikely to change his mind; and if he does, he is always free to initiate an interview. The court's order does no more than forbid nagging him into doing so. We are in no position to conclude that requiring two,

or three, or twenty turndowns would be the better rule. We decline to do so and uphold this portion of the court's order.

The Ban on Inquiry into Specific Votes of Other Jurors

"No interviewer may inquire into the specific vote of any juror other than the juror being interviewed."

We must now determine the validity of the above "rule narrowly tailored to prevent the disclosure of the ballots of individual jurors," a matter on which we expressly declined comment in *Express-News*, 695 F.2d, at 811. Our ruling requires little more than a specific application of the general principles announced in *United States v. Gurney*, 558 F.2d 1202 (5th Cir. 1977).

There we held generally that members of the press, in common with all others, are free to report whatever takes place in open court but enjoy no special, First Amendment right of access to matters not available to the public at large. The particulars of jury deliberation fall in the latter class, and the court's narrow restriction was well within its discretion. As the Supreme Court observed, in the course of assuming the existence of a common-law privilege against forced disclosure of such matters:

Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world.

Clark v. United States, 289 U.S. 1, 13, 53 S.Ct. 465, 468, 77 L.Ed. 993 (1933) (Cardozo, J.).

Mandamus is DENIED.¹⁰ The order appealed from is AFFIRMED.